FEB 12 1968
LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 618

FORTNIGHTLY CORPORATION,
Petitioner,

v.

UNITED ARTISTS TELEVISION, INC.,
Respondent.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION BY BROADCAST MUSIC, INC. FOR PERMISSION TO FILE A BRIEF AMICUS CURIAE

AMBROSE DOSKOW
SYDNEY M. KAYE
ASA D. SOKOLOW
JOSEPH W. GELB
575 Madison Avenue
New York, New York 10022
Attorneys for Amicus Curiae

Of Counsel:

ROSENMAN COLIN KAYE PETSCHEK
FREUND & EMIL
575 Madison Avenue
New York, New York 10022

INDEX

PAGE

MOTION FOR PERMISSION TO FILE A BRIEF AMICUS CURIAE vi

BRIEF OF AMICUS CURIAE 1

INTEREST OF AMICUS CURIAE 1

ARGUMENT 2

I—CATV SYSTEMS GIVE PUBLIC PERFORMANCES FOR PROFIT WITHIN THE MEANING OF THE COPYRIGHT ACT 2

A. The Right Of Public Performance For Profit Has Consistently Been Held To Include The Dissemination Of Copyrighted Works By New Methods; CATV Does Not Differ In Principle From Other New Methods 2

B. Copyright Protects Each Public Performance Of The Content Of A Copyrighted Work Whether It Is Spoken On A Stage, Shown In A Theatre, Or Transmitted Or Retransmitted As Electromagnetic Energy 6

C. The Imposition Of Copyright Liability On CATV Operators Is Required By The Policy Of The Copyright Act 8

II—THERE IS NO BASIS FOR A "LICENSE IMPLIED IN LAW" PERMITTING CATV SYSTEMS TO PERFORM COPYRIGHTED WORKS, EITHER GENERALLY OR WITHIN A LIMITED AREA 11

A. A "License Implied In Law" Would Create An Unjustified Exemption From The Copyright Law By Judicial Legislation 11

B. There Is No Greater Justification For An Implied License In A Limited Area, Such As That Proposed By The Solicitor General, Than For An Unlimited License 13

CONCLUSION 22

CITATIONS

CASES:	PAGE
Associated Music Publishers, Inc. v. *Debs Memorial Radio Fund,* 46 F. Supp. 829 (S. D. N. Y. 1942), aff'd, 141 F. 2d 852 (2d Cir.), cert. denied, 323 U. S. 766 (1944)	7
Buck v. *Debaum,* 40 F. 2d 734 (S. D. Cal. 1929)	12
Buck v. *Jewell-LaSalle Realty Co.,* 283 U. S. 191 (1931)	3, 12
Cable Vision, Inc. v. *KUTV, Inc.,* 335 F. 2d 348 (9th Cir. 1964), cert. denied, 379 U. S. 989 (1965)	9
Davis v. *Du Pont,* 240 F. Supp. 612 (S. D. N. Y. 1965)	3
Dorchester Music Corp. v. *National Broadcasting Co.,* 171 F. Supp. 580 (S. D. Cal. 1959)	3
Dugan v. *American Broadcasting Corp.,* 216 F. Supp. 763 (S. D. Calif. 1963)	6
Edwin H. Morris & Co., Inc. v. *Kaufman,* 59 U. S. P. Q. 393 (M. D. Pa. 1943)	8
F. C. C. v. *Pottsville Broadcasting Co.,* 309 U. S. 134 (1940)	9
Harms v. *Cohen,* 279 Fed. 276 (E. D. Pa. 1922)	8
Harms, Inc. v. *Sansom House Enterprises, Inc.,* 162 F. Supp. 129 (E. D. Pa. 1958), aff'd sub nom., *Leo Feist Inc.* v. *Lew Tendler Tavern, Inc.,* 267 F. 2d 494 (3d Cir. 1959)	2, 3
Jerome H. Remick & Co. v. *American Automobile Accessories Co.,* 5 F. 2d 411 (6th Cir.), cert. denied, 269 U. S. 556 (1925)	3, 8
Kalem Co. v. *Harper Bros.,* 222 U. S. 55 (1911)	3
Law v. *National Broadcasting Co.,* 51 F. Supp. 798 (S. D. N. Y. 1943)	6

PAGE

M. Witmark & Sons v. *L. Bamberger & Co.*, 291 Fed. 776 (D. N. J. 1923) 3, 12, 15

Mazer v. *Stein*, 347 U. S. 201 (1954) 6, 9

Metro-Goldwyn-Mayer Dist. Corp. v. *Bijou Theatre Co.*, 59 F. 2d 70 (1st Cir. 1932) 2

PIC Design Corp. v. *Sterling Precision Corp.*, 231 F. Supp. 106 (S. D. N. Y. 1964) 6

Prestige Floral, Societe Anonyme v. *Zunino-Altman, Inc.*, 203 F. Supp. 649 (S. D. N. Y.), aff'd, 301 F. 2d 286 (2d Cir. 1962) 6

Reed v. *Holliday*, 19 Fed. 325 (W. D. Pa. 1884) 12

Select Theatres Corp. v. *The Ronzoni Macaroni Co.*, 59 U. S. P. Q. 288 (S. D. N. Y. 1943) 6

Shapiro, Bernstein Co. v. *Mitchell*, 41 U. S. P. Q. 645 (S. D. Miss. 1939) 8

Shapiro, Bernstein & Co v. *Veltin*, 47 F. Supp. 648 (W. D. La. 1942) 8

Society of European Stage Authors and Composers, Inc. v. *New York Hotel Statler Co.*, 19 F. Supp. 1 (S. D. N. Y. 1937) 3, 12

The Gelles-Widmer Co. v. *Milton Bradley Co.*, 313 F. 2d 143 (7th Cir. 1963), cert. denied, 373 U. S. 913 (1963) 6

Tiffany Productions, Inc. v. *Dewing*, 50 F. 2d 911 (D. Md. 1931) 2

United States v. *Paramount Pictures, Inc.*, 334 U. S. 131 (1948) 9

PAGE

CONSTITUTION OF THE UNITED STATES:

Article I, Sec. 8, cl. 8 8

STATUTES:

Communications Act
47 U. S. C. § 414 9

Copyright Act

17 U. S. C. § 1(c) 2, 17
17 U. S. C. § 1(d) 2, 7
17 U. S. C. § 1(e) 2, 7, 12, 17
17 U. S. C. § 27 6
17 U. S. C. § 104 18

TREATIES:

Brussels Convention 1948, Stockholm Convention 1967, Article 11 bis (1) (ii) 21

ADMINISTRATIVE DECISIONS AND REPORTS:

CATV Operational and Ownership Data—1966, F. C. C. Release No. 605, Public Notice G, November 22, 1967 5

Columbia Broadcasting System, Inc., Pike & Fischer 10 R. R. 2d 809 19

Daytime Standard Broadcast Stations, Pike & Fischer 18 R. R. 1689 19

First Report and Order On Microwave Relays, 38 F. C. C. 683 5

Second Report and Order on CATV, 2 F. C. C. 2d 725 ..... 4, 5, 10, 17

LEGISLATIVE MATERIALS:

H. R. 2512 21

Hearings on H. R. 4347, Before Subcommittee of House Comm. on The Judiciary, 89th Cong. 1st sess., pt. 1 (1965) 17

PAGE

OTHERS:

Broadcasting 1968 Year Book 5

Broadcasting Magazine, January 29, 1968 20

Seiden, An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry, Report to the F. C. C. ... 15

State of the Union Message 19

Variety 1967 Annual Radio-TV Review 5

Wall Street Journal, October 18, 1967 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 618

FORTNIGHTLY CORPORATION,
Petitioner,

v.

UNITED ARTISTS TELEVISION, INC.,
Respondent.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR PERMISSION TO FILE A BRIEF AMICUS CURIAE

Pursuant to Rules 35 and 42 (3) of the Rules of this Court, Broadcast Music, Inc. (BMI) respectfully moves the Court for permission to file the annexed brief *amicus curiae* herein on the following grounds:

1. BMI requested both parties herein to consent to its filing of a brief *amicus curiae* in support of respondent's position. On December 19, 1967, respondent United Artists Television, Inc., granted such consent. Petitioner Fortnightly Corporation, on January 23, 1968, declined to

consent, but its counsel authorized the undersigned as attorneys for BMI to state that petitioner does not intend to file any opposition to this motion.

2. On December 4, 1967, this Court granted petitioner's Petition For A Writ Of Certiorari. On that same date this Court granted permission to the National Cable Television Association, Inc. (NCTA) to submit a brief *amicus curiae* in support of the Petition and invited the Solicitor General to submit a brief expressing the views of the United States. NCTA stated in its motion that its brief represented the broad industry view held by the community antenna television (CATV) interests. The Solicitor General has filed a memorandum. NCTA has filed a motion for permission to file another brief, and we understand that other interested parties have made, or are about to make, motions for leave to file *amicus* briefs.

3. BMI is a music performing rights licensing organization. Fourteen thousand writers of music and 8,000 publishers of music have granted to BMI the right, under section 1(e) of the Copyright Act, to license the public performance for profit of their copyrighted musical works. Such performing rights are then licensed by BMI to a variety of music users, including radio stations and networks, television stations and networks, wired background music systems, hotels, restaurants and other establishments. During its last fiscal year, BMI collected in license fees approximately $25 million, the bulk thereof from broadcasters. All of BMI's income, after operating expenses and a reserve, is paid to its affiliated writers and publishers.

4. The question presented in this case is:

Do the activities of the operator of a CATV system in receiving and retransmitting copyrighted works transmitted by broadcasting infringe the right granted by the Copyright Act to the copyright proprietor to perform the copyrighted work publicly?

BMI is vitally interested in the resolution of this question, and it seeks to file a brief *amicus curiae* to support the decisions of the District Court and the Court of Appeals below.

5. CATV operators, including petitioner Fortnightly, have transmitted for profit and are transmitting for profit copyrighted music in BMI's repertory without license or payment of royalties. BMI, and its affiliated writers and publishers, will be directly affected by the outcome of this case. Petitioner seeks complete or partial exemption from copyright liability. The Solicitor General opposes any total exemption, but has apparently endorsed petitioner's request for partial exemption. It is the position of BMI that any judicially-created exemption—whether total or partial —would defeat the purposes of the Copyright Act and would be injurious to BMI and to the writers and publishers of music.

6. The respondent, United Artists Television, Inc., is an important distributor of motion picture films, some of which include music. However, the performing rights to the musical works in BMI's repertory which are embodied in such films are not vested in United Artists, but are licensed by BMI directly to broadcasters for performance solely over their facilities.

7. BMI believes that the parties to this action, not representing the writers and publishers of music, may present facts and arguments aimed at the effects of the decision below on their own economic interests. They can not represent the interests of the thousands of copyright holders engaged in the field of music whose legitimate interests would be greatly damaged if CATV operators were not required to pay for the use which they make of copyrighted works.

Respectfully submitted,

AMBROSE DOSKOW
SYDNEY M. KAYE
ASA D. SOKOLOW
JOSEPH W. GELB
575 Madison Avenue
New York, New York
Attorneys for Broadcast Music, Inc.

Of Counsel

ROSENMAN COLIN KAYE PETSCHEK FREUND & EMIL
575 Madison Ave.
New York, N. Y. 10022

February 10, 1968

BRIEF OF BROADCAST MUSIC, INC. AS *AMICUS CURIAE*

INTEREST OF AMICUS CURIAE

Broadcast Music, Inc. (BMI) is a music performing rights licensing organization which licenses the right publicly to perform for profit the music of more than 14,000 writers and more than 8,000 publishers of music. Those writers and publishers grant to BMI the right, secured to them by Section 1(e) of the Copyright Act, 17 U. S. C. § 1(e), to perform their copyrighted works publicly for profit. BMI licenses those performing rights non-exclusively to all types of music users, including radio and television stations and networks,[1] wired background music systems, hotels, restaurants and other establishments.[2]

The royalties collected by BMI, after deduction of expenses and reasonable reserves, are distributed to its affiliated writers and publishers. By far the largest part of those royalties are paid by broadcasters who have licenses to broadcast over their facilities any or all of the works in the BMI repertory at a royalty based on the station's gross receipts from advertising. Those licenses to broadcasters are limited to transmissions over their own facilities. They contain no grant of rights to operators of community antenna television (CATV) systems, who receive the broadcast signals and retransmit programs containing copyrighted material for their own profit. The issue in this case is whether CATV operators may exploit copyrighted works by communicating them to their subscribers without license from the copyright proprietors or the payment of any compensation to them.

---

[1]Broadcasters obtain the right to perform the music which is in BMI's repertory solely under their licenses from BMI. Broadcasters do not obtain that right from the producers of motion pictures, recordings or tapes.

[2]Music users may obtain licenses directly from writers and publishers of the individual musical compositions in BMI's repertory, but, in practice, they do not do so.

That issue plainly has implications extending far beyond the operations of petitioner's systems in the two West Virginia towns here involved. CATV operators have become important disseminators of musical performances. There is every indication that their importance is increasing. Reversal of the decision below would create serious inroads upon the author's and composer's right of public performance for profit, the major source of compensation to the writers and publishers of music whose works are licensed by BMI.

ARGUMENT

I

CATV SYSTEMS GIVE PUBLIC PERFORMANCES FOR PROFIT WITHIN THE MEANING OF THE COPYRIGHT ACT

A. The Right Of Public Performance For Profit Has Consistently Been Held To Include The Dissemination Of Copyrighted Works By New Methods; CATV Does Not Differ In Principle From Other New Methods.

The rights under copyright include the exclusive right in the proprietor to perform the copyrighted work publicly[3] —publicly for profit if the work is a non-dramatic literary work, a motion picture other than a photoplay, or a musical composition.[4] The public performance right has consistently been held to embrace every means of communicating the contents of a copyrighted work to the public, whether by motion pictures,[5] wired transmissions,[6] broadcast by radio

---

[3] 17 U. S. C. §§ 1(c),(d),(e).

[4] It is undisputed that if CATV systems engage in the public performance of copyrighted works, they do so for profit.

[5] *Tiffany Productions, Inc.* v. *Dewing*, 50 F. 2d 911 (D. Md. 1931); *Metro-Goldwyn-Mayer Dist. Corp.* v. *Bijou Theatre Co.*, 59 F. 2d 70 (1st Cir. 1932).

[6] *Harms, Inc.* v. *Sansom House Enterprises, Inc.*, 162 F. Supp. 129 (E. D. Pa. 1958), *aff'd sub nom., Leo Feist Inc.* v. *Lew Tendler Tavern, Inc.*, 267 F. 2d 494 (3d Cir. 1959).

and television,[7] or the reception of a broadcast for communication to members of the public by wire.[8] It is immaterial that the particular device by which the public is enabled to receive the performance of a copyrighted work was not in existence when the statute was enacted.[9]

The courts below were plainly right in following this Court's decision in *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U. S. 191 that "a single rendition of a copyrighted selection" may result in "more than one public performance for profit." 283 U. S. at 198. Indeed, the findings of the District Court, unchallenged here, show that the business in which petitioner is engaged, view from the technological and economic aspects, is much more clearly within the statutory purpose to protect the author's performance right than was the activity of the hotel in the *Jewell-LaSalle* case.

Technologically, in contrast to the simple installation in the hotel, the District Court described the operating requirements of petitioner's business as follows (Joint Appendix ("J. A.") 38a):

> "Each of the defendant's wire television systems requires a permanent staff of highly qualified technicians; intricate and expensive test and maintenance

---

[7] *M. Witmark & Sons* v. *L. Bamberger & Co.*, 291 Fed. 776 (D. N. J. 1923); *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.*, 5 F. 2d 411 (6th Cir.), *cert. denied*, 269 U. S. 556 (1925); *Dorchester Music Corp.* v. *National Broadcasting Co.*, 171 F. Supp. 580 (S. D. Cal. 1959); *Davis* v. *Du Pont*, 240 F. Supp. 612 (S. D. N. Y. 1965).

[8] *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U. S. 191 (1931); *Society of European Stage Authors and Composers, Inc.* v. *New York Hotel Statler Co.*, 19 F. Supp. 1 (S. D. N. Y. 1937).

[9] *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.*, 5 F. 2d 411 (6th Cir.), *cert. denied*, 269 U. S. 556 (1925); *Harms, Inc.* v. *Sansom House Enterprises, Inc.*, *supra*; *cf. Kalem Co.* v. *Harper Bros.*, 222 U. S. 55 (1911).

> equipment; special tools; continuous preventive maintenance; and an expensive inventory of cable, amplifiers and other spare parts. A system such as each of defendant's systems would require approximately ten to fifteen people to run it."

Economically, the distribution of programs is no sideline as it was to the hotel. That is the sole business in which CATV systems are engaged. As the District Court found, petitioner "promoted, vended and distributed programs to [its] subscribers" and "competed with the local television station and vied with programming much in the same way that television broadcasting stations compete with one another by means of the programs they offer" (J. A. 34a-35a).

It is indisputable that CATV systems have a great impact on the market for performances of copyrighted works. They have become important disseminators of copyrighted material, and derive large revenues from such use. The Federal Communications Commission (F. C. C.) has found that "CATV growth has been explosive and gives every indication of continuing its phenomenal spurt."[10] "Equally important," the Commission said, "is the changing nature of the CATV operation." The Commission noted that in 1959 the average CATV system provided three signals to its subscribers, that the average system "built today" [March 1966] has a 12-channel capacity, and that 20-channel systems are proposed, with industry leaders predicting that they will become commonplace in the next five years. It also noted that "the CATV industry has shifted its attention to the larger communities."[11]

---

[10] *Second Report and Order, Community Antenna Television Systems* ("Second Report and Order"), 2 F. C. C. 2d 725, Pike and Fisher 6 R. R. 2d 1717, ¶ 116 (1966).

[11] *Id.* at ¶ 117.

There are presently over 2,000 systems.[12] According to data presented herein by the National Cable Television Association (NCTA), the CATV trade association, there are some two and one-half million CATV subscriber-homes.[13] Revenues derived from these homes amount to over $150,000,000,[14] exclusive of installation charges. The President of NCTA, in a signed article, has quoted with approval an estimate that by 1985 CATV systems will be taking in $2.3 billion a year.[15] If the decision below were reversed, the copyright proprietor could seek royalties only from those who derive part of the profits from the performance of his works—perhaps a comparatively small part.

The F. C. C. has found that CATV constitutes a threat to the broadcasters from whom BMI derives the major portion of its revenues.[16] To protect the broadcasters, the F. C. C. has adopted its rules regulating CATV. Whether those regulations will accomplish their purpose is not here relevant. The Court is here required to construe the copyright law. The regulations of an administrative agency acting under another statute form no part of the copyright law and do not aid in its interpretation. Those regulations, if not invalidated by this Court, could be modified at any time.

---

[12]CATV Operational and Ownership Data—1966, F. C. C. Release No. 605, Public Notice G, November 22, 1967; *Motion and Brief of N C T A as Amicus Curiae, Jan. 24, 1968, p. 5.*

[13]The N C T A states that it represents 885 CATV systems having 1,407,000 subscriber-homes, which is over 56% of CATV served homes. *Brief of N C T A as Amicus Curiae*, p. 4.

[14]It is assumed that the average subscriber pays $5 a month, the figure assumed in the *Brief of N C T A as Amicus Curiae*, p. 18. Many systems charge more. *Broadcasting 1968 Year Book*, pp. 16, 18, citing a survey by Motorola, Inc., states that present industry revenues are $189,000,000—$171,000,000 from monthly charges and $18,000,000 from installation charges.

[15]Variety 1967 Annual Radio-TV Review, p. 34.

[16]*First Report and Order On Microwave Relays*, 38 F. C. C. 683, Pike and Fischer 4 R. R. 2d 1725, ¶¶ 49-82 (1965); *Second Report and Order*, ¶¶ 25-46.

B. Copyright Protects Each Public Performance Of The Content Of A Copyrighted Work Whether It Is Spoken On A Stage, Shown In A Theatre, Or Transmitted Or Retransmitted As Electromagnetic Energy

Petitioner contends (*Brief For The Petitioner,* p. 21) that, while the complex equipment which it operates receives signals, amplifies them, converts them to other channels, and distributes them by wire to thousands of homes, it does not engage in performance because it "deal[s] only with electromagnetic energy and in no respect with the sights or sounds of television programs." Petitioner ignores the fact that such electromagnetic energy, which it amplifies and exploits for its own profit, embodies the program content protected by the copyright law.[17] It seeks unsuccessfully to obscure the identity in all relevant respects between what the broadcaster does and what a CATV operator does. No meaningful distinction in terms of the Copyright Act can be made between the two.

Almost all television broadcasting, as petitioner recognizes (p. 22), is performed from film or tape, and most radio broadcasting is done from tape and phonograph records. When a network program is broadcast, there is a separate public performance by each station which receives it by wire or by microwave and transmits it to its local audience.[18] In all such cases, the broadcaster deals "only with electromagnetic energy" (p. 21), and the sights

---

[17]Copyright protects the content of a work, rather than the tangible object in which it is embodied. 17 U. S. C. § 27; *Mazer* v. *Stein,* 347 U. S. 201, 217 (1954); The *Gelles-Widmer Co.* v. *Milton Bradley Co.,* 313 F. 2d 143, 147 (7th Cir. 1963), *cert. denied,* 373 U. S. 913 (1963); *Prestige Floral, Societe Anonyme* v. *Zunino-Altman, Inc.,* 203 F. Supp. 649, 651 (S. D. N. Y.), *aff'd,* 301 F. 2d 286 (2d Cir. 1962); *PIC Design Corp.* v. *Sterling Precision Corp.,* 231 F. Supp. 106, 111 (S. D. N. Y. 1964); *Dugan* v. *American Broadcasting Corp.,* 216 F. Supp. 763, 765 (S. D. Cal. 1963).

[18]*Select Theatres Corp.* v. *The Ronzoni Macaroni Co.,* 59 U. S. P. Q. 288 (S. D. N. Y. 1943); *Law* v. *National Broadcasting Co.,* 51 F. Supp. 798 (S. D. N. Y. 1943).

and sounds of its programs are not visible or audible within its station.

Petitioner acknowledges (p. 47) that the Copyright Act "expressly recognizes" that the playing of a record, film or tape in which the copyrighted work is recorded "constitutes a 'performance' of the work."[19] That recognition is required not only by Section 1(d) of the Act, cited by petitioner, but also by Section 1(e). The latter section, in granting a compulsory license for the mechanical recording of musical compositions, provides that the royalty paid for such a license "shall free the articles or devices . . . from further contribution to the copyright *except in case of public performance for profit*" (emphasis added).

Every performance consists only of the dissemination of energy. It is immaterial whether the energy consists of vibrations of the vocal chords, the plucking or bowing of a string, the activation of a column of air, the striking of a drum, the playback of a tape or recording, or the activation of a wire. The energy in each case serves to communicate the content of the author's work. Such energy becomes sight and sound only when it strikes the eye and eardrum of a sensate being and is perceived by the nerves and brain of a viewer or listener. Neither the broadcaster nor the CATV operator controls the loudspeaker or picture tube of the receiving set by which electromagnetic energy is converted into sound and light waves which are transmitted through the auditory and ocular system to the nerves and brain of the television viewer.

The relevance of the broadcasting cases may not be avoided by petitioner's reliance on the broadcaster's selection of the program material. First, the District Court expressly found that petitioner pre-selected the stations

---

[19]See, *Associated Music Publishers, Inc.* v. *Debs Memorial Radio Fund*, 46 F. Supp. 829, 831 (S. D. N. Y. 1942), *aff'd*, 141 F. 2d 852 (2d Cir.), *cert. denied*, 323 U. S. 766 (1944).

whose programs were provided to the subscribers, and did so "in some instances, even contrary to the expressed preference of most of the subscribers" (J. A. 40a). Secondly, it has repeatedly been held that the exclusive right of performance may be infringed by the operators of establishments, such as ballrooms, even where a musician plays a composition without the operator's authority and contrary to his order.[20]

Petitioner's performance is undoubtedly "public". The claim that it is private because it takes place simultaneously in hundreds of homes rather than in a single public place was rejected at an early date.[21] Petitioner's contention is irreconcilable with both the broadcasting and the hotel cases.

C. The Imposition Of Copyright Liability On CATV Operators Is Required By The Policy Of The Copyright Act

There is no merit whatever in petitioner's claim that recognition of the CATV operator's role in performing copyrighted works would somehow offend the policy of the Copyright Act. The cases, cited pp. 2-3, *supra*, which recognize that the novelty of the mechanical device is irrelevant to the author's rights, reflect the consistent policy of construing the statutory language to fulfill the constitutional purpose to "promote the Progress of . . . useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings."[22] Petitioner seeks (pp. 58-62) to divide that policy into two, asserting—on the basis of

---

[20] *Shapiro, Bernstein & Co.* v. *Veltin*, 47 F. Supp. 648 (W. D. La. 1942); *Shapiro, Bernstein Co.* v. *Mitchell*, 41 U. S. P. Q. 645 (S. D. Miss. 1939); *Edwin H. Morris & Co., Inc.* v. *Kaufman*, 59 U. S. P. Q. 393 (M. D. Pa. 1943); *Harms* v. *Cohen*, 279 Fed. 276 (E. D. Pa. 1922).

[21] *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.*, 5 F. 2d 411, 412 (6th Cir.), *cert. denied*, 269 U. S. 556 (1925).

[22] U. S. Const. Art. I, sec. 8, cl. 8.

statements taken out of context[23]—that the Act's "primary" consideration is to make works available to the public, with reward to the author a "secondary" consideration. The division is unreal; the two considerations are opposite sides of the same coin. Unless the author's participation in the fruits of his works is safeguarded as changes occur in economics and technology, the incentive to the creator to produce and disseminate will be seriously weakened.

The only issue here is one of interpretation of the Copyright Act. Petitioner seeks to confuse that issue, however, by invoking the supposed policy of the Communications Act. The effort is wholly misplaced since that Act does not repeal, amend, or act as an interpretive guide to any portion of the Copyright Act. Section 414 of the Communications Act, 47 U. S. C. § 414, explicitly provides that nothing in that Act "shall in any way abridge or alter the remedies now existing at common law or by statute . . ." See *F. C .C.* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138 (1940). Neither expressly or impliedly does that Act limit rights under copyright. The Court of Appeals for the Ninth Circuit in *Cable Vision, Inc.* v. *KUTV, Inc.*, 335 F. 2d 348, 349 (9th Cir. 1964), *cert. denied*, 379 U. S. 989 (1965), in holding that any action to enforce rights in television programs against CATV retransmission must be based on copyright rather than state laws of unfair competition, stated:

> "Congress had not pre-empted the adjustment of property rights in the communications field by passage of the Communications Act of 1934."

---

[23]The statement quoted from *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 158 (1948) was in the context of a decision that the interest of rewarding the copyright proprietor is outweighed by the public interest making tying contracts illegal under the antitrust laws. The quotation of the *Paramount* sentence in *Mazer* v. *Stein*, 347 U. S. 201, 219 (1954) was immediately followed by an affirmation of the copyright purpose to encourage individual effort by personal gain as the best way to advance the public welfare.

The F. C. C. has repeatedly disclaimed jurisdiction over copyright issues.[24]

Petitioner also injects into the present question of statutory interpretation the extraneous assertion that recognition of the copyright proprietor's rights may have "harmful anticompetitive consequences." Copyright is by definition a limited monopoly. The possibility of abuse is inherent in every patent or copyright, and the antitrust laws are freely invoked where abuses appear. All copyright proprietors affected by the outcome of this case remain subject to the antitrust laws and, under those laws, may be enjoined from any improper extension of their statutory rights.

The only question here presented is whether CATV operators render public performances of the copyrighted program material which they transmit to their subscribers for profit. The courts below were plainly right in answering that question affirmatively.

---

[24]With reference to the present case, the F. C. C. has stated (Second Report and Order, ¶ 108):

> "We have stated that our decision is not intended to affect in any way the pending copyright suits, involving as they do matters entirely beyond our jurisdiction. We have simply taken into account the existing practices of CATV systems and the present inability of program suppliers to control the availability of their programs via CATV. Thus, the fact that we have given the local station the right to have its signal carried over the CATV system (and not duplicated for a reasonable period), affords no defense to that system in a copyright suit. *The station cannot bestow broadcast or transmission rights to programming which it does not own (or as to which it has not obtained a license to do so)* (emphasis added).

II

THERE IS NO BASIS FOR A "LICENSE IMPLIED IN LAW" PERMITTING CATV SYSTEMS TO PERFORM COPYRIGHTED WORKS, EITHER GENERALLY OR WITHIN A LIMITED AREA

A. A "License Implied In Law" Would Create An Unjustified Exemption From The Copyright Law By Judicial Legislation

Petitioner's claim to a "license implied in law" is simply a plea for the judicial creation of an exemption from the statute. Once it is recognized that CATV systems engage in publicly performing for profit the copyrighted works which they disseminate to their subscribers, the exemption which petitioner seeks can properly be granted only by legislation.

Not surprisingly, petitioner's arguments for an implied license are the same as those advanced to support the contention that the term "perform" in the Act should be narrowly construed to exclude the CATV operator. As shown above, those arguments are without merit.

The petitioner's stated concern for homeowners is unjustified. Homeowners do not infringe copyrights by receiving programs in the privacy of their homes. Full recognition of such private enjoyment does not require that control over the public performances of copyrighted works which are broadcast be taken away from copyright proprietors and handed gratuitously to third parties to be exploited for their profit.

The right of the public to receive broadcast performances privately does not warrant the creation of a wholly distinct license to give another public performance. The broadcast of a performance of copyrighted music from a concert hall is a separate public performance from that

which is rendered to the audience in the hall, and a separate payment is made for each. And if a theatre owner were to charge admission to view a television program, his separate public performance would not be authorized by the broadcaster's license.[25]

As the court below noted, the right of a copyright proprietor to limit licenses to perform his work in public to defined periods and areas or audiences has never been seriously challenged (J. A. 1362). This is in accordance with the basic policy of the Copyright Act that the author should have control over the exploitation of each of the rights conferred by his copyright, and thus be in a position to determine how those rights can most effectively be exploited.[26] Where there are exceptions to that policy, they have been created by statute. Thus Section 1(e) of the Copyright Act creates a compulsory license for the recording of a musical work after the copyright proprietor has authorized a single recording of that work. And the right of public performance for profit has been limited by the same section to exclude performances by juke boxes. The legislative character of these exceptions is apparent. It is inconceivable that either of them could have been engrafted on the statute by this Court. The proposal that this Court create a "license implied in law" is, equally, a legislative one. The creation of such a license for the entire United States would be destructive of the theory of copyright law and the

---

[25] *Society of European Stage Authors and Composers, Inc.* v. *New York Hotel Statler Co., Inc.*, 19 F. Supp. 1 (S. D. N. Y. 1937). The only holding to the contrary is *Buck* v. *Debaum*, 40 F. 2d 734 (S. D. Cal. 1929), which followed the District Court decision in *Jewell-LaSalle*, later reversed by this Court. *Debaum* is patently inconsistent with the decision in *Jewell-LaSalle* that there may be multiple performances and "a monopoly is expressly granted for all public performances for profit" (283 U. S. at 197).

[26] See, *M. Witmark & Sons* v. *L. Bamberger & Co.*, 291 Fed. 776, 780 (D. N. J. 1923); *Reed* v. *Holliday*, 19 Fed. 325, 327 (W. D. Pa. 1884).

interest of copyright proprietors. As the Solicitor General states (*Memorandum For The United States As Amicus Curiae,* p. 9), such an unlimited license "would be inconsistent not only with the terms of the statute but also with existing precedents and with sound policy."

B. There Is No Greater Justification For An Implied License In A Limited Area, Such As That Proposed By The Solicitor General, Than For An Unlimited License.

Petitioner erroneously states (p. 84) that "the court below placed an express limitation on its holding that petitioner's CATV systems are liable for copyright infringement." The sentence from the Court of Appeal's opinion which petitioner quotes, however, states only that if a system's subscribers, by normal antennas, could receive satisfactorily one or more of the stations whose programs are carried by the CATV system, "it might then be contended that a copyright holder licensing a broadcast of a work over such a station must be held to have licensed their viewing of the work" (J. A. 1366). Petitioner then proceeds (pp. 85-89) to knock down the straw man of its own creation, pointing out its indefiniteness and the impracticality of a license dependent on house-to-house investigation.

Petitioner contends, however, that, at the very least, the policies of the Copyright and Communications Acts require the implication of a license for a CATV system to operate within the Grade B contours of the television stations whose programs it seeks to appropriate. The proposal that this Court create such a partial exemption has been adopted by the Solicitor General, with the recognition (p. 6) that this "is not a license at all, but is simply a rule of law fashioned by the courts. . . ."

This Court is thus asked to refashion the Copyright Act to mean that the copyright proprietor's control over public

performances for profit does not extend to CATV performances of broadcast programs in an area where reception of the broadcast can be expected at the best 50% of locations for 90% of the time, but excluding areas within the "Grade A contour" of another station. The rationale of this proposal is that the "Grade B contour" is the "normal service area" of a station, and that increase of the station's audience in that area can be expected to increase its advertising revenues, and consequently its payment of performance royalties, without having "a substantial adverse impact on the incentive to create" (p. 11). That position, we respectfully submit, is fallacious.

1. Assuming *arguendo* the correctness of the Solicitor General's factual assumptions, acceptance of his proposal would deprive copyright proprietors of substantial revenues to which they are rightfully entitled under the basic premise of the copyright law. Copyright proprietors depend for their compensation upon royalties, and royalties are based on the proceeds which result from the utilization for profit of copyrighted works. The largest part of the enormous increase in revenue which CATV systems are expected to receive will come from the operation of systems wholly within the theoretical Grade B contours of originating stations in large cities, where the subscriber potential is highest. The earnings of CATV systems in such areas may, indeed, dwarf the receipts of local stations, and the application of such a standard as is suggested might deprive authors and composers of one of their most substantial sources of income.

Since a CATV system renders public performances, denial to the copyright proprietor of his right to participate in the revenue from those performances cannot be justified. CATV is big business. It can afford to pay the royalties

which are a normal part of any communications business using copyrighted material.[27]

The District Court was plainly right in excluding evidence intended to show that CATV performances should not pay their way because those performances increase the royalties from the separate performances rendered by the broadcasters. The assumption underlying the offer of proof on this point is that the copyright proprietor should not charge for one performance because that performance increases his revenue from another. This claim is indistinguishable from that advanced and rejected in the early radio cases that broadcast performances of a musical work should be free of royalty payment because those performances increase the sale of sheet music copies of the works. The factual premise of this argument was accepted by the court in *M. Witmark & Sons* v. *L. Bamberger & Co., supra,* but the argument was rejected on the ground that "the copyright owners and the music publishers themselves are perhaps the best judges of the method of popularizing musical selections," and that in any event, "the method, we think, is a privilege of the owner." 291 Fed. at 780.

2. Accepting for purposes of argument the Solicitor General's assumption (pp. 9-10) that CATV carriage of a local station's signals may increase its advertising revenue and thus the revenue of copyright proprietors, the Solicitor General has failed to take into account certain countervailing considerations which would reduce copyright royalties.

There is nothing in the copyright law which prevents CATV systems from carrying advertising. Many of them

---

[27]CATV systems enjoy a "ratio of profits to revenue . . . [of] 57 percent, or more than twice the 1963 profit margin of 27 percent . . . calculated for the TV broadcasting industry exclusive of the networks and their owned-and-operated stations." Seiden, An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry," Report to the F. C. C., p. 27.

utilize some of their channels to present news, weather information, stock market reports, time checks and similar material, accompanied in some cases by advertising. Thus they compete with broadcasters for advertising revenue, and they use the copyrighted works which they present in order to attract subscribers who will view their material.

An increasing number of CATV systems, moreover, originate entertainment programming on some of their channels.[28] To the extent that viewers are drawn to CATV originated programs, even without advertising, such programs reduce the audience of the local broadcaster on which the broadcaster's advertising volume and rate depend and on which payment to the copyright proprietors depend. To the extent that they attract advertising, they directly reduce the revenue of the broadcaster from which royalties to the copyright proprietor are paid.[29]

Furthermore, there is nothing in the Copyright Act, whether construed as suggested or otherwise, that would prevent a CATV operator from eliminating the advertising which precedes and follows a copyrighted broadcast pro-

---

[28]The Wall Street Journal of October 18, 1967 stated that 180 CATV systems are originating their own shows, that this is treble the number of systems which originated programs only a year ago, and that the NCTA estimates that within a year some 350 systems may be originating programs. The article refers to one CATV system which is receiving almost enough advertising revenue to cover the cost of originating its local shows.

[29]BMI certainly does not object to the origination of programs by CATV systems or to the carrying of advertising in connection with such programs, provided that CATV systems are not exempt from the payment of copyright royalties for the broadcast programs which they retransmit. Clearly, CATV operators, on any theory, would have to pay royalties for the use of copyrighted works in programs originated by them. If CATV is, in any respect, exempted from payment for the retransmission of broadcast programs, the CATV operator will have an incentive to rely on such programs and he will correspondingly be discouraged from originating independent programming.

gram, and if he wishes, to substitute other advertising messages. A regulation of the F. C. C. is intended to prevent this only with respect to the broadcasts of stations which the CATV system is required to carry under the Commission's carriage rules.[30] The rights under copyright should not be dependent upon the regulations of an administrative agency acting under another statute.

3. In certain other important respects the proposed curtailment of the right of public performance would undoubtedly cause injury to copyright proprietors and be detrimental to the public interest.

Musical compositions and non-dramatic literary works are entitled to protection against public performance only if they are public performances for profit. 17 U. S. C. §§ 1(c), (e). As is well known, non-profit broadcasting is increasing rapidly and will be further stimulated by the establishment of the Corporation for Public Broadcasting. Non-profit stations perform musical compositions and other non-dramatic works without the consent of, or the payment of any royalty to, copyright proprietors.[31] Adoption of the Solicitor General's theory would enable CATV operators to convert non-profit performances into profit performances for which the copyright proprietors would receive no compensation.

Even where copyright royalties are payable, there would be unjust consequences. Many FM radio and UHF television stations are in a position to pay only nominal fees. Performances of serious works, such as symphonies, could

---

[30] *Second Report and Order*, ¶ 75.

[31] The spokesman for the American Composers Alliance testified before Congress that performances on such stations constitute a large percentage of all of the broadcast performances of the serious composer. *Hearings on H. R. 4347, Before Subcommittee of House Comm. on The Judiciary, 89th Cong., 1st sess., pt. 1, at 226 (1965).*

LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1967

No. 618

FORTNIGHTLY CORPORATION,
Petitioner,

v.

UNITED ARTISTS TELEVISION, INC.,
Respondent.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *AMICUS CURIAE*

HERMAN FINKELSTEIN
SIMON H. RIFKIND
JAY H. TOPKIS
PAUL S. ADLER
Attorneys for Amicus Curiae
575 Madison Avenue
New York, New York 10022

Of Counsel:
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
575 Madison Avenue
New York, New York 10022

not be authorized without exposing the works to further performance by a CATV system which might seriously jeopardize the prospect of other performances. In the case of a small station, the copyright proprietor would either have to impose a fee beyond the power of the station to pay, or to deny the use entirely. Such consequences would obviously be contrary to the public interest, as well as to that of the author.

4. The Solicitor General recognizes that the Grade B contour of a station is not only an approximation of its normal service area, but one which does not fit all situations and which the parties may seek to have changed by administrative action. He defends it, nevertheless, on the ground that its inexactness and instability "is probably outweighed by the certainty it provides as to much of the area covered" (p. 15).

That "certainty" is illusory even in the area of communications regulation for which the Grade B contour was devised. Thus, the Solicitor General concedes (p. 14) that the F. C. C. now permits parties to show that the actual contour of a station differs markedly from the predicted line. Accordingly the scope of the proposed "license" would apparently depend upon the outcome of an administrative proceeding to which the copyright proprietor would not be a party.[32]

As applied to copyright, the Grade B contour concept introduces alien elements of indefiniteness.[33] The Solicitor General admits (p. 15) that it would be necessary to leave

---

[32]If it be assumed that the F. C. C. would allow intervention by copyright proprietors when the Grade B contours of a station are in issue, the burden and cost of participation in such a technical proceeding could probably not be justified.

[33]So indefinite a standard is inconsistent with the enforcement of the criminal remedies of the Copyright Act. 17 U. S. C. § 104.

"special situations" to what he terms "case-to-case resolution." In this area, the supposed "certainty" would be subject to variation in a judicial proceeding. The technological and theoretical considerations relating to Grade B contours do not produce "certainty", and they have no proper place in the administration of the copyright law.

Even in the present state of technology, it is not possible to impose rational geographical limitations. The Solicitor General recognizes (p. 14) that "the whole 'contour' concept may become obsolete if (through satellite and other improvements) a station's signals can be extended to encompass the entire continent." This is not a statement of future potential, but of present actuality. The synchronous satellites in space today are theoretically capable of reaching every home in the United States with copyrighted material originating in this or any other country.[34] CATV systems would be able to bring such satellite signals directly into the home, bypassing the local stations.

Many CATV systems, with their capacity for numerous channels, furnish radio as well as television programs. If the transmission of sight and sound is to be exempt within any area, sound alone would presumably be subject to the same limitation. However, there is no Grade B contour in radio. Clear channel radio stations serve much larger areas at night than they do in the daytime. At night, they furnish a recognized secondary service which extends for more than 700 miles.[35]

---

[34] The President, in his recent State of the Union message, said that "we are going to bring to bear every resource of mind and technology" to bring education to children throughout the country by satellite broadcasting.

[35] *Columbia Broadcasting System, Inc.*, Pike & Fischer 10 R. R. 2d 809, 815. That secondary service primarily reaches rural areas. *Daytime Standard Broadcast Stations Pike & Fischer* 18 R. R. 1689, 1693, fn. 6. CATV transmission of distant radio stations to urban areas would divert listeners from local radio stations with resultant loss to copyright proprietors.

There have been indications, moreover, that both the President's Task Force on Telecommunications and the F. C. C.'s Advisory Committee on Land Mobile Services are considering removing the dissemination of television programs in whole or in part from the broadcast spectrum and causing them to be distributed by wire.[36] Faced with these developments, existing and future, it is apparent that the supposed "certainty" of the Grade B contour standard wholly fails to carry out the purpose of the proposed "license implied in law."

5. It is no answer to the foregoing considerations that, on the remand suggested by the Solicitor General, the District Court could fashion a license to meet particular cases of inequity, as well as the "special circumstances of overlapping . . . which argue against implying a license on the particular facts involved" to which his memorandum (p. 17) refers. Indeed, that very suggestion accentuates the fallacy in the proposal that, in a case involving solely the private rights of two parties under the existing copyright law, such a legislative function should be undertaken. Moreover, any such concept would make the copyright law practically unenforceable, requiring as it would, technological proof in addition to the normal proof of infringement.

The Solicitor General states (p. 17) that the problems involved are more appropriately dealt with by negotiation or legislative action. His suggestion is that this Court adopt a stopgap permitting extensive uses of copyrighted material which, under present law, are infringements. He states (p. 2) that the Court's decision "may contribute to the ultimate legislative solution" of the problems involved. He claims (p. 16) that his stopgap proposal coincides with

---

[36]Broadcasting Magazine, January 29, 1968, p. 88.

"the most likely legislative resolution of the matter of CATV copyright liability for the future." It should be noted, however, that the proposed legislative resolution which he cites was embodied in H. R. 2512 when it was considered by the Subcommittee headed by Congressman Kastenmeier, but was rejected *in toto* when H. R. 2512 was passed by the House of Representatives. There has been no indication, moreover, that the Senate will restore the discarded CATV provisions of the bill, and it is certainly possible that other solutions will be sought.[37]

We respectfully suggest that the adoption of a Grade B contour concept by this Court would involve innumerable problems and complexities and would be far more likely to act as a Procrustean bed for future legislation than as an aid to such legislation. There are no sound reasons for the partial exemption suggested. The pendency of this case has not hindered the phenomenal growth of CATV systems. No industry has ever been hampered by the need to pay copyright fees. Indeed, the payment of copyright fees, by encouraging the dissemination of the material on which all communication depends, is an essential to every means of communication.

---

[37]That free performance in an artificially limited area is not the logical legislative solution is suggested by the experience of other countries. The 58 countries of the Berne Union, whose adherents include most of the important countries of the world, are required by the specific provisions of the Berne Convention to protect the rights of the author in all areas of wire retransmission of broadcast performances. Brussels Convention 1948, Stockholm Convention (not yet ratified) 1967, Article 11 bis (1) (ii).

CONCLUSION

We respectfully urge upon the Court the affirmance of the decision below as a straight-forward, logical and, indeed, inevitable interpretation of the Copyright Act.

Respectfully submitted,

AMBROSE DOSKOW
SYDNEY M. KAYE
ASA D. SOKOLOW
JOSEPH W. GELB
575 Madison Avenue
New York, New York 10022
Attorneys for Amicus Curiae
Broadcast Music, Inc.

Of Counsel:

ROSENMAN COLIN KAYE PETSCHEK
FREUND & EMIL
575 Madison Avenue
New York, New York 10022

February 10, 1968.